Petition

Office - Supreme Court, U.S.
FILED
DEC 14 1981
ALEXANDER L. STEVAS,
CLERK

81-1138

No. .....

IN THE

Supreme Court of the United States

October Term, 1981

THE STATE OF CONNECTICUT

Petitioner,

v.

LESTER SMITH

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, JUDICIAL DISTRICT OF WATERBURY

FRANCIS M. MCDONALD
State's Attorney

F. PATRICK O'SULLIVAN
Assistant State's Attorney

300 Grand Street
Waterbury, CT 06702
P. O. Box 1245
(203) 756-4431

QUESTIONS PRESENTED

A. Is the dismissal by the Supreme Court of Connecticut of the State of Connecticut's appeal of a trial court's order suppressing the defendant's confession a final judgment sufficient to give rise to this Court's certiorari jurisdiction?

B. Did the Connecticut trial court properly apply the decision of *Edwards* v. *Arizona* to the facts of this case?

TABLE OF CONTENTS

Page

Table of Authorities i

Opinion Below iii

Statement of Jurisdiction iii

Constitutional and Statutory Provisions iii

Statement of the Case 2

Argument of Law 6

Conclusion 16

Appendix

TABLE OF AUTHORITIES

CASES

Page

Abney v. *United States*, 431 U.S. 651 8

Brewer v. *Williams*, 430 U.S. 387 13

California v. *Stewart*, 384 U.S. 436 6

Cobbs v. *Robinson*, 528 F.2d. 1331 12

Cohen v. *Beneficial Finance Corporation*, 337 U.S. 541 8

Dickson v. *Petrolium Conversion Corp.*, 338 U.S. 507 8

Edwards v. *Arizona*, U.S. , 101 S.Ct. 1880 4

Escobedo v. *Illinois*, 378 U.S. 478 14

Gellespie v. *United States Steel Corp.*, 379 U.S. 148 7

Jenkins v. *Deleware*, 395 U.S. 213 15

Johnson v. *New Jersey*, 384 U.S. 719 14

Land v. *Dollar*, 330 U.S. 731 8

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 .. 8

Linkletter v. *Walker*, 381 U.S. 618 14

Michigan v. *Mosley*, 423 U.S. 96 ..... 11, 13

Miranda v. *Arizona*, 384 U.S. 436 13

North Dakota Pharmacy Board v. *Snyder's Stores*, 414 U.S. 156 .. 6

People v. *Cunningham*, 49 N.Y. 2d. 203 14

Radio Station WOW v. *Johnson*, 326 U.S. 120 6

State v. *Bell*, 179 Conn. 98 7

CASES (Continued)

Page

State v. *Cobbs*, 164 Conn. 402 12

State v. *Lloyd*, 43 Conn. Law Journal 5 7

State v. *Moeller*, 178 Conn. 67 7

State v. *Moscone*, 171 Conn. 500 12

Stovall v. *Denno*, 388 U.S. 293 14

Tehan v. *United States ex rel. Shott*, 382 U.S. 406 15

United States v. *Brown*, 457 F.2d. 731 12

United States v. *Brown*, 569 F.2d. 236 12

United States v. *Charlton*, 565 F.2d. 86 13

United States v. *Cobbs*, 481 F.2d. 196 12

United States v. *General Motors Corp.*, 323 U.S. 337 8

United States v. *Hart*, 619 F.2d. 323 12

United States v. *Hauck*, 486 F.2d. 1296 13

United States v. *Phaester*, 544 F.2d. 353 13

United States v. *Thomas*, 474 F.2d. 110 13

White v. *Finkbeiner*, 611 F.2d. 186 13

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment Five iii

United States Constitution, Amendment Fourteen iii

STATUATORY PROVISIONS

18 U.S.C. Section 3731 4

28 U.S.C. Section 291 8

28 U.S.C. Section 1257 (3) ..... iii, 6, 8

OPINION BELOW

I. CITATION

The decision of the Connecticut Supreme Court granting the defendant's motion to dismiss the state's appeal is not reported. A copy of the Order dismissing the appeal is attached.

The decision of the Connecticut Superior Court granting the defendant's motion to suppress his confession is likewise not reported. The Memorandum of the trial judge deciding the motion is attached.

II. JURISDICTIONAL GROUNDS

On July 27, 1981, the Superior Court, the trial court in this matter, entered an order that the confession of the defendant be suppressed. That ruling was appealed and on October 15, 1981, the Connecticut Supreme Court dismissed the appeal. The Jurisdiction of this court is invoked under authority of 28 U.S.C. Section 1257(3).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The State of Connecticut submits that this case was decided in the Connecticut Superior Court upon the Fifth Amendment and Section I of the Fourteenth Amendment to the United States Constitution:

> 1) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. .....

IN THE

Supreme Court of the United States

October Term, 1981

THE STATE OF CONNECTICUT,

Petitioner,

v.

LESTER SMITH,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, the State of Connecticut, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on Ocober 15, 1981.

STATEMENT OF CASE

The defendant, Lester Smith, of Waterbury, Connecticut, has had his confession suppressed on Constitutional grounds. The Supreme Court of Connecticut has refused to review this suppression on its merits.

STATEMENT OF FACTS

On Friday, February 1, 1980, two black males entered the Willow Pharmacy in Waterbury, Connecticut. Both were armed with handguns. They ordered the pharmacist to give them narcotics from the store safe and also took the contents of the cash register. The pharmacist and a customer were then thrown to the floor and taped together.

Unknown to the robbers, the pharmacist had triggered a silent alarm and before they were able to leave the store a Waterbury police officer arrived on the scene. As he entered the store, one of the robbers fired a shot at him. He was then disarmed and the robbers fled the scene taking the officer's gun with them. Lester Smith was connected with the robbery when the car used in the holdup was subsequently traced to him. A warrant was procured for his arrest and he was arrested on Saturday, February 2, 1980. (T-22, 5/5/81).

At the time of his arrest Smith was warned of his rights and indicated that he wished to speak to his father about getting an attorney. (T-94, 5/5/81). The police offered to call an attorney of his choice but he proffered no name other than that he did not want the public defender. (T-95, 5/5/81). Because Mr. Smith did not ask for an attorney but merely for his father, the police continued to talk to him. (T-98, 5/5/81). During this interview the defendant made no inculpatory statements or admissions. (T-99, 5/5/81).

On February 3, a detective who had not participated in the interrogation the previous day, received word that Smith wished to see him. (T-16, 5/6/81). He and another detective, who had participated in the previous interrogation, brought the defendant from a detention cell in the Waterbury Police Department up to the detective division. He expressed a desire to use the phone and was told he was free to call anyone he wanted to call. (T-17, 5/6/81). He called his girlfriend, spoke with her awhile and then requested that she be allowed to visit him. (T-17, 5/6/81). While

awaiting the visitor, Smith was asked if he wished to give a statement and indicated he would prefer to talk to his girlfriend first. (T-17-18, 5/6/81). She arrived, stayed forty-five minutes to an hour, and when she left the defendant was returned to the detention cell, having declined to speak with police at that time. (T-18-19, 5/6/81).

On February 4, two detectives who were unaware of the events of either Saturday or Sunday visited the defendant in his detention cell in the Waterbury Police Department. (T-127-128, 5/5/81). Smith agreed to talk to these officers, was brought to the detective bureau and was advised of his rights. (T-129-130, 5/5/81). Smith expressed a willingness to give a statement and wanted to know what the detectives could "do for him." (T-132-133, 5/5/81). He was told no promises would be made but that they would pass along to the prosecutor the amount of bond he could post. This ultimately was done. (T-133-134, 5/5/81). Smith then had coffee and a sandwich as he told police about his involvement with another man in the robbery at the Willow Pharmacy during which the shot was fired at the police officer.

The defendant filed a motion to suppress his confession and after a pretrial hearing that motion was granted, based upon the trial judge's understanding of *Edwards* v. *Arizona,* U.S. , 101 S.Ct. 1880. The State attempted to appeal this ruling without dismissing the charges against the defendant since oher evidence of his guilt still existed. The Connecticut Supreme Court refused to entertain the appeal, however, and granted the defendant's motion to dismiss it as interlocutory. This was done even though the State claimed irreparable harm if forced to try the defendant prior to the suppression issue being reviewed and despite the fact that in other circumstances, where defendants claimed irreparable harm, review was allowed prior to trial.

Unfortunately, Connecticut does not have a statute comparable to 18 U.S.C., Section 3731 which would allow appeals of pretrial suppression rulings. The State did, however, specifically argue to the Connecticut Supreme Court that irreparable harm would result

should the convincing confession evidence be withheld from the jury and the defendant acquitted. In that event, the suppression order would never be reviewed by the Connecticut court and if it were erroneous, retrial of the defendant would be precluded.

The Connecticut Supreme Court having refused to hear this appeal, the State of Connecticut now seeks review of the suppression order in this Court, the interpretation of whose decision gave rise to that order.

ARGUMENT OF LAW

I.

Review under 28 U.S.C. 1257 may be had only of final judgments rendered by the highest court of a state. The "finality" requirement serves several functions including: 1) the avoidance of piecemeal review by federal courts of state court decisions; 2) the avoidance of advisory opinions; 3) the avoidance of federal intrusion in state affairs. *North Dakota Pharmacy* v. *Snyder's Stores,* 414 U.S. 156, 159. But the concept of finality has a "penumbral area," as Mr. Justice Frankfurter pointed out in *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 124.

It is submitted that a case which falls within this penumbral area is *California* v. *Stewart,* 384 U.S. 436. There, the Supreme Court of California reversed a conviction on grounds that the method used to obtain the defendant's confession violated the United States Constitution. A new trial was ordered and the State of California sought certiorari. This Court granted the Writ and found the state decision to be final since an acquittal of the defendant at his new trial would have precluded an appeal by the state under California law.

The parallel between *Stewart* and the present case is clear. Just as in the California case, where the state would have been precluded by state law from retrying that defendant after an acquittal, here the State of Connecticut would be precluded from retrying Lester Smith by the Double Jeopardy provision of the Fifth Amendment to the United States Constitution. This would be so even if on appeal the trial judge's suppression of Smith's confession were ultimately found to have been erroneous. In light of this, it seems not only a poor use of judicial time but also patently unfair to require a complete trial of this case before review of the suppression order is accorded the state. Since review was granted by this Court in *Stewart,* it should likewise be allowed here.

It is worthy of note that on other occasions the Connecticut Supreme Court has accorded defendants pretrial review of adverse

rulings. In *State* v. *Bell,* 179 Conn. 98 (1979), that court reviewed, prior to trial, the denial of an application for treatment as a Youthful Offender. And in *State* v. *Moeller,* 178 Conn. 67 (1979) pretrial review was accorded a defendant who claimed he was twice being placed in jeopardy for the same crime. Finally, in *State* v. *Lloyd,* 43 Conn. Law Journal 5 (8/4/81), review was granted where a dismissal of charges was denied following entry of a nolle prosequi by the state.

Certainly the issue at stake in this case is at least as important as in those cases mentioned above, yet review was denied here while it was granted there. The only apparent difference is that here the aggrieved party is the State rather than an individual defendant.

Another case which appears to fall within the "penumbral area" spoken of by Justice Frankfurter is *Gellespie* v. *United States Steel Corporation,* 379 U.S. 148. There, the petitioner sued the respondent to recover damages for the death of her son, a seaman who had been killed while working on the respondent's dock. She sued under both the Jones Act and an Ohio wrongful death statute. The District Court, ruling that the Jones Act was her exclusive remedy, struck all references to the Ohio statute. The petitioner then appealed that ruling to the Court of Appeals which affirmed the lower court ruling. Certiorari was granted by this Court.

In discussing the "finality" aspect of the case, this Court noted that "final" does not necessarily mean the last possible order to be made in a case. Rather, final:

> '. . . is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and . . . it is impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction'." *Gellespie* v. *United States Steel,* supra 152.

This Court also noted with approval in *Gellespie* language in *Dickson* v. *Petroleum Conversion Corp.,* 338 U.S. 507, 511, to the effect that in deciding the finality issue the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

Weighing the relevant criteria, this Court found the decision of the District Court limiting relief to the Jones Act sufficiently final to allow review. The Court then went on to note that delay of perhaps a number of years in having the petitioner's rights determined would work a great injustice since recovery would be cut off as long as the District Judge's order remained in force. As a further reason for allowing review, this Court cited *United States* v. *General Motors Corp.,* 323 U.S. 337, for the proposition that where a ruling is fundamental to the further conduct of the case, review of that ruling may be had even where the case has not been fully tried. See also *Land* v. *Dollar,* 330 U.S. 731; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682; *Cohen* v. *Beneficial Finance Corp.,* 337 U.S. 541.

It is true that *Gellespie* was decided under 28 U.S.C. Section 291 rather than under 28 U.S.C. Section 1257. It would appear, however, that decisions construing the former are persuasive authority in construing the latter, at least as far as the issue of finality is concerned. *Abney* v. *United States,* 431 U.S. 651, 660.

Looking at the case at bar in light of both *Stewart* and *Gellespie,* It seems clear that the decision of the Connecticut Supreme Court not to review the suppression order on its merits is final. If the State is forced to try Lester Smith without benefit of his confession, double jeopardy would bar any meaningful review of the suppression. order. The State is, therefore, placed in the same situation as was the State of California in the *Stewart* case. In both cases a party is irreparable harmed by refusal of this Court to grant review and that party is the people of each state. Just as this Court refused to allow such an injustice to the people of California in *Stewart,* it should do likewise for the people of Connecticut in this case.

And just as this Court refused to allow the petitioner in *Gellespie* to suffer irreparable harm, so should it prevent similar harm to the people of Connecticut in this case.

When this Court applies a constitutionally based exclusionary rule to the states, as was done in *Edwards* v. *Arizona,* supra, otherwise reliable evidence becomes unavailable in criminal prosecutions. Since the states are now forced by the Federal Constitution to operate under this rule, fairness demands that the federal judicial system afford review in cases such as this prior to double jeopardy banning meaningful review forever. If this Court does not provide review and the Connecticut Supreme Court is allowed to avoid the merits of this case, then the State is left utterly and completely without a chance for review by this Court of the application of one of its decisions by a state court. This Court would never allow such a situation to exist with regard to a defendant. Surely, the citizens of the State of Connecticut deserve the same consideration.

II.

In suppressing the defendant's confession, the trial judge relied upon this Court's recent decision of *Edwards v. Arizona,* supra. In that case the defendant, after having been arrested on a state criminal charge and given his "Miranda Rights," stated that he wanted an attorney. The next day other officers went to the jail where Edwards was being held and when he refused to see them was informed by jail personnel that he "had to." These officers also warned Edwards of his rights and he subsequently gave them a confession.

The trial judge in this case acknowledged that it is factually distinguishable from *Edwards* (Memorandum, p. 26). He felt bound, however, to suppress this defendant's confession because of what he perceived to be a "per se" rule that once a person who is under arrest requests counsel no interrogation can occur unless the accused himself "initiates" further contact with the police (Memorandum p. 26, 27).

The facts of this case indicate that on the day of his arrest, February 2, the defendant requested to speak to his father about getting an attorney. The police offered to call an attorney, but he merely indicated that he did not want the public defender. No attorney's name was offered by the defendant. The next day, February 3, the defendant himself asked to speak with police and his request was granted. During this interview he was allowed to use the telephone, and instead of calling an attorney or even calling his father about an attorney, either of which call he could have made, he telephoned his girlfriend. This opportunity to use the telephone seems to fulfill the requirement of *Edwards* that counsel be made available to the defendant.

The holding in *Edwards* required that once an attorney has been clearly requested, any confessing resulting from a subsequent interrogation will be suppressed unless the defendant initiates contact. The key, then, as Mr. Justice Powell pointed out in his concurring opinion, is how the word "initiates" is construed. In *Edwards,* where the police went to the jail to see the defendant, where he unequivocally expressed a desire not to see them, where he was told he had to talk to them and was then taken from his cell and brought to them, clearly he did not initiate contact.

In contrast to *Edwards,* here the police did not have to go to a jail to see Smith since he was being held in the police station. He did not refuse to speak to them but, rather, was willing to do so, particularly if the police could "do anything for him." And he was not brought to where the police were waiting but rather willingly accompanied them up to the detective bureau. Thus, the question of who initiated contact here is far more difficult to answer than it was in *Edwards.*

As was also pointed out in the Powell concurrence, communication between the police and a suspect in custody is not uncommon. And the police surely have a right to inquire as to whether a defendant has changed his mind about speaking to them without an attorney being present. Nothing in the Constitution prevents a defendant from reconsidering or the police from asking him about

that change of mind. As Mr. Justice White pointed out in his concurring opinion in *Michigan* v. *Mosley,* 423 U.S. 96, 109, this Court has consistently refused to insulate a defendant from the results of his own intelligent and voluntary decisions about his case.

In concurring in the result in *Edwards,* Chief Justice Burger noted that protections accorded a suspect in a criminal case, like so many other good things, can be carried too far. That is exactly what is happening in this case. The Constitution is being twisted and reshaped in an attempt to give this defendant more protection than the drafters of the Constitution ever intended.

Edwards held that once the right to counsel has been asserted, a suspect is not subject to further interrogation unless he initiates contact. But, apparently, this requirement may be eliminated if, in the time between the request for counsel and the subsequent confession, an opportunity to contact counsel is given. Here, not only was contact re-established by the defendant but in the interim he had a method of contacting counsel made available to him. All he had to do was telephone a lawyer during the February 3 interview, but instead he telephoned his girlfriend.

The problem that arises factually in this case is that the defendant's confession did not follow upon his request to see police on Sunday, February 3. Rather, it took place the following day, Monday, February 4. That contact was with officers who did not know of the defendant's Saturday request to see his father about getting an attorney. This is in contrast to the situation in *Edwards* where the officers who went to question Edwards were "colleagues of the detectives who had questioned Edwards the previous night," *Edwards* v. *Arizona,* supra 1882, and must have known of his request for counsel.

When police visited Lester Smith on February 4 he was again warned of his rights and made no mention of wanting to see an attorney, his father, his girlfriend or anyone else. All he wanted was to know if the police would make some sort of a deal with

him. Surely his failure to reassert a desire for counsel, if in fact he had ever unequivocally made that request, indicates his clear desire to abandon his intention of seeking counsel. *Cobbs* v. *Robinson,* 528 F.2d. 1331 (2nd Cir. 1975), cert. denied, 96, S.Ct. 1419.

Even if this Court does find this case sufficiently similar to *Edwards* to cause it to come within the ambit of the holding of that case, *Edwards* should not be applied to this case because the confession in this case was given on February 4, 1980, and *Edwards* was not decided until May 18, 1981. Until that time there was no indication that this Court would interpret the right to counsel requirement to the U.S. Constitution the way it did.

Certainly, the Waterbury police acted within the requirements of Connecticut law. In both *State* v. *Cobbs,* 164 Conn. 402 (1973) and *State* v. *Moscone,* 171 Conn. 500 (1976), the Connecticut Supreme Court examined the issue of waiver of counsel after an initial request and in both cases the Court said that once an accused has requested counsel he may thereafter waive that right provided that in the interim he has had a full opportunity to obtain counsel. The factual situation in *Cobbs* is remarkably similar to that of the case at bar. There the defendant indicated a desire for counsel, was allowed to use the phone and instead of calling an attorney called his grandmother. She came to the police station and, after speaking with her, Cobbs gave a confession. The Court found a knowing and intelligent waiver as well as an opportunity to obtain counsel of which the defendant did not avail himself. Cobbs then filed a Writ of Habeas Corpus and the decision of the Connecticut Supreme Court was upheld by the Second Circuit Court of Appeals in *Cobbs* v. *Robinson,* supra.

Other Circuit Courts of Appeals considering this issue have also found a knowing and intelligent waiver to be possible despite a previous request for counsel. See *United States* v. *Brown,* 457 F.2d. 731, (1st. Cir. 1972); *United States* v. *Cobbs,* 481 F.2d. 196 (3rd. Cir. 1973) cert. denied, 414 U.S. 980; *United States* v. *Hart,* 619 F.2d. 325 (4th. Cir. 1980); *United States* v. *Brown,*

569 F.2d. 236 (5th. Cir. 1978), rehearing denied April 12, 1978; *United States* v. *Charlton,* 565 F.2d. 86 (6th. Cir. 1977), cert. denied, 434 U.S. 1070; *White* v. *Finkbeiner,* 611 F.2d. 186 (7th. Cir. 1979) rehearing en banc denied Feb. 15, 1980; *United States* v. *Hauck,* 486 F.2d. 1296 (8th. Cir. 1978), rehearing denied Dec. 18, 1978; *United States* v. *Pheaster,* 544 F.2d. 353 (9th. Cir. 1976), cert. denied, 429 U.S. 1099; *United States* v. *Thomas,* 474 F.2d. 110 (10th. Cir. 1972) cert. denied, 412 U.S. 932.

In deciding *Edwards* v. *Arizona,* supra, this Court announced a new constitutional rule. Examination of the language of previous cases, most notably *Miranda* v. *Arizona,* 384 U.S. 436, *Michigan* v. *Mosley,* 423 U.S. 96, and *Brewer* v. *Williams,* 430 U.S. 387, would not have led even the most expansive reader to suspect that the rule announced in *Edwards* was forthcoming. In *Mosley* this Court said that once a person has expressed a wish to remain silent that right could subsequently be waived so long as his right to cut off questioning had been scrupulously honored in the interm. In a footnote this Court suggested that this decision dealt only with the right to remain silent. However, in *Miranda* this Court said:

> ". . . if an individual states that he wants an attorney, the interrogation must cease until an attorney is present. . . If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination *and his right to retained or appointed counsel."* (Emphasis added) 384 U.S. at 474.

And in *Brewer* this Court said:

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, waive his

> rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." (Emphasis added) 430 U.S. at 405.

It has been clear since *Linkletter* v. *Walker,* 381 U.S. 618, that the Constitution does not require retrospective effect for decisions announcing new constitutional rules which affect criminal cases. The criteria used to determine whether retroactivity shall be required include: 1) the purpose to be served by the new standard; 2) the extent of reliance by law enforcement authorities on the old standard; and 3) the effect on the administration of criminal justice of retroactive application of the new standard. *Stovall* v. *Denno,* 388 U.S. 293.

The purpose of the *Edwards* rule is to ensure that a confession given after a request for counsel is the product of a free and voluntary waiver or relinquishing of the right to counsel. In this case, the trial judge found that the defendant was knowledgeable in the workings of the criminal justice system, that he was not subjected to intimidation or physical force, that his will was not overborne and that his confession was voluntary. (Memorandum, p. 11). There was no direct evidence offered concerning police reliance on the old standard. However, such reliance must be assumed since everyone is presumed to know the law and since the law on February 4, 1981, as interpreted by the Connecticut Supreme Court and the United States Courts of Appeals, would have found a waiver under the circumstances presented here. Finally, it is anticipated that retroactivity will have an adverse affect on the administration of criminal justice since apparently only one jurisdiction ascribed to the rule announced in *Edwards* prior to the date of that decision. See *People* v. *Cunningham,* 49 N.Y. 2d 203. But even that case was rooted in New York rather than U.S. Constitutional law.

Petitioner is aware of the holding in *Johnson* v. *New Jersey,* 384 U.S. 719 to the effect that the holdings in *Escobedo* v. *Illinois,* 378 U.S. 478 and *Miranda* v. *Arizona,* supra would receive appli-

cation only from the dates of those decisions. However, in *Jenkins* v. *Delaware,* 395 U.S. 213 this Court held that *Miranda's* standards would not be applied to post-*Miranda* retrials of cases originally tried prior to that decision. In light of the purpose of the rule announced in *Edwards,* which, it is submitted, was satisfied in this case according to the findings of the trial judge, and the reliance by police on the previous standard which, it is submitted, was extensive, the application of the *Edwards* standard to this case would serve only one purpose. It would allow a self-admitted armed robber to escape punishment because of a "legal technicality."

The exclusionary rule, which was intended to give force and effect to the Fourth Amendment has became "a shelter to the guilty" rather than " a protection to the innocent." *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406. This Court can reverse that trend rather than perpetuating it. That change in direction must start somewhere and this case has sufficient merit to make it the first step in a new direction, a direction in which the Constitution once again protects the innocent instead of sheltering the guilty.

CONCLUSION

In light of the foregoing, it is clear that if review is to be accorded the State of Connecticut on the merits of this case it must come from this Court. Only in this way will the trial judge's interpretation of *Edwards* v. *Arizona* be corrected.

THE STATE OF CONNECTICUT

Francis M. McDonald

F. Patrick O'Sullivan

APPENDIX

INDEX TO APPENDIX

Page

Decision of Trial Court 1A

Notice of Dismissal 25A

NO. CR4-77369	: SUPERIOR COURT
STATE OF CONNECTICUT v.	: JUDICIAL DISTRICT OF WATERBURY
LESTER SMITH	: July 27, 1981

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS WRITTEN CONFESSION AND ALL ORAL STATEMENTS MADE WITHOUT BENEFIT OF COUNSEL

FINDING OF FACTS

1. Lester Smith was born on February 25, 1948.
2. On Saturday, February 2, 1980, Mr. Smith turned himself in to the detective division at Waterbury Police Headquarters at about 11:30 a.m.
3. The charges arose out of a claimed occurrence at the Willow Pharmacy at 214 Hillside Avenue, Waterbury, about 1:30 p.m. on February 1, 1980.
4. Detective Vincent Paolino and Detective Joseph Morgan booked Smith in the customary fashion.
5. During the booking procedure Detective Morgan advised Smith of his Miranda rights.
6. Smith's father and woman companion Debra Baptiste accompanied Smith to the police station.
7. Shortly after booking Detective Vincent Paolino and Detective Morgan were asked to interview Smith on tape.
8. Detective Paolino had known Smith for some time.
9. The interview took place in an interview room in the detective division, approximately from 12:30 to 1:00 p.m.
10. The tape recorder was visible on the single table in the interview room.
11. Detective Morgan conducted the interrogation.

12. Smith was advised of his Miranda rights during the interview and shown a white Miranda card which he read.

13. The best available transcript of the interview follows:

"Interrogation of Lester Smith — Waterbury Police Department February 2, 1980

Key: LS = Lester Smith
PO = Police Officer

PO: Who do you want to call? Who's your lawyer? Do you have anybody in mind that you want to call?

LS: I want to call my mother or call my father.

PO: Your father's gone. He's gone. What kind of (inaud.) What do you want to call him for?

LS: So he can get me a lawyer.

PO: You tell us who the lawyer, we can get you a lawyer if that's what you want.

LS: I don't want no public defender.

PO: No, I said if you tell us who you want we'll call him for you. (Pause) I'll get you a public defender, but first let me advise you of your rights.

LS: O.K.

PO: Did you read these here? (Pause) That's not true. That's not true.

LS: I have been advised and know that I have a right to remain silent.

PO: That's what we're doing. We're advising you right now. All right, you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and have him present with you while you are being questioned. If you can't afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any

time to exercise these rights and not answer any questions or make any statements. Understand your rights?

LS: Yeah.

PO: OK listen I know you told that you're not, you're not involved in this shooting right? You're saying that you didn't do the shooting?

LS: Yeah, I was saying that I am not involved, period.

PO: OK you're not involved in the robbery (inaud.). Tell me where you were all day yesterday. Start in the morning, what time did you get up, and go through the whole day.

LS: You already boooked me right?

PO: Yeah, but this is only for you, if you didn't do it then tell us where you were yesterday.

LS: Oh, man, I just got through doing six years. I know how the thing run, man, I know what your doing. I (inaud.) understand what you're doing, understand this.

PO: What did you do six years for, Les?

LS: For robbery.

PO: Was that the one down in New Haven?

LS: No.

PO: What was that for, Les?

LS: New York.

PO: A bank job?

LS: Yeah.

PO: OK, how, when did you get out of jail?

LS: (Inaud.) January 16th.

PO: Of 1980?

LS: 1979.

PO: '79 1-16-79. Where did you do your time?

LS: Lewisburg.

PO: Oh, federal? OK and you went away when, in '73 maybe? You robbed a bank in New York City? Whereabouts Lester, do you remember?

LS: That don't have nothing to do with this.

PO: I just want to make sure, verify your record.

LS: Southern District, upper Manhattan.

PO: You got out in '79. Have you been arrested since '79, Les?

LS: No.

PO: You been living in Waterbury all that time? Do you want to tell us again what you did yesterday?

LS: It's not fair (inaud.). It's not fair (inaud.).

PO: We're giving you a chance, listen - -

LS: I got no right to be here.

PO: OK listen - -

PO: Lester - -

PO: But because of Vinny we're giving you a chance to tell your side of the story. Do you want to tell us what you did yesterday?

LS: I told (inaud.).

PO: Well you didn't tell me, you told him. Just go through the day briefly. Tell me what happened yesterday.

LS: I got up at seven o'clock. (Inaud.). Took her to work.

PO: Whose car did you have with (inaud.)?

LS: Deborah's mother's car.

PO: Why did you borrow her car?

LS: I didn't borrow it. I was doing some work (inaud.).

PO: Now what happened?

LS: That was a Thursday. Yesterday, right?

PO: Right.
(Inaud.)

PO: Why don't you get rid of it?

PO: Who's your lawyer?

LS: (Inaud.)

PO: They want us to go out in the hall. Where are you Joe? Just to the car can you go through it quick we got to go out on our fucking calls. Son of a bitch. OK, you brought Debbie to work rather, right Les?

LS: Yes.

PO: Then what happened, wehre did you go for the rest of the day? Just briefly.

LS: Came back home about a quarter to nine.

PO: Yesterday morning?

LS: I just (inaud.) James and Jasper at my house.

PO: James and Jasper?

LS: I had planned to drive the car to (inaud.) but I got a call from Deborah's father telling me that they were hiring (inaud.) put in an application at the employment office. I was there from I guess about ten to about twelve or something like that.

PO: Were you by yourself?

LS: I was in the employment office by myself.

PO: Right, but when you went down, you went down with Jasper and James?

LS: Yeah. And then went to New Haven. Went to the Bama Club. In and out in and out. We went to a boarding house on Vernon Street.

PO: And all this time, did you have the car?

LS: No. left the car on (inaud.) Street.

PO: On (inaud.) Street at what time?

LS: When I got back about a quarter to nine.

PO: Well after you took Deborah to work, you took the car there back to (inaud.) Street and left it there?

LS: See I had (inaud.) had to use the emergency brakes. The brakes was fucked up on the car. That was the reason for me using the car (inaud.) supposed to fix the brakes.

PO: Why didn't you bring it to have the brakes fixed? Why didn't you bring it to have the brakes fixed?

LS: Because I got no ride you know. The ride was there and there was (inaud.).

PO: Now both of these guys you were with were both from New Haven.

LS: I don't know (inaud.).

'PO: That you worked at New Departure with?

LS: I don't know James.

PO: James who?

LS: I don't know. I never met him. He's a friend of my uncle, you could say.

PO: Who's your uncle?

LS: Jasper. Uncle, brother.

PO: Who had the car Les?

LS: James.

PO: James.

LS: (Inaud.) the car. See (inaud.) Jasper (inaud.) apartment (inaud.).

PO: Where do you live now Les?

LS: I live with my parents (inaud.) Deborah.

PO: Deborah, that's the girl who was in here this morning. We're going to have to go, we're going to bring him now, we have to go. We'll have to come back after. Les, as soon as they process your papers, you can make your call and

we'll talk to you when we come back. Lester, are you on parole now? No? Who's your P.O.?

LS: Flamia.

PO: Flamia, all right. That's since January of last year you're been out? How much longer is your parole for - - how much longer? What do you see him, once a week Les?

LS: Once a month.

PO: You have a nickname, don't you?

LS: No.

PO: Alright."

(END OF TAPE)

14. When Sgt. Frank Dest reported for duty at 6:00 a.m. on Sunday, February 3, 1980, Smith had left word that he wanted to see Sgt. Dest.

15. Sgt. Dest met with Smith in the general room of the detective division for about 30 to 45 minutes at about noon.

16. Telephone arrangements had been made with Baptiste to come to the police station and during most of the time that Smith was in the general room he was talking closely and somewhat privately with Baptiste.

17. During this meeting Smith asked Baptiste to make arrangements with his parents to get a lawyer.

18. During the meeting Smith told Dest he didn't want to make a statement then; he wanted to talk to his girl friend first.

19. Baptiste and Smith's parents were at the office of Attorney William St. John on Monday morning February 4, 1980, at 9:00 a.m.

20. Attorney St. John did not arrive at the office until some time after 10:00 a.m., at which time he was retained as a lawyer for Smith.

21. Lt. Anthony Solomita came on duty about 9:00 a.m. Monday, February 4.

22. He knew Smith had been arrested but did not know about the taped interview or Smith's statement thereon concerning counsel.

23. About 9:45 a.m. Solomita and Sgt. Charles Messina went to the cell block to talk to Smith.

24. He went with them to an interview room where Solomita and Messina talked with Smith about 10 minutes before he started to give a statement.

25. Sgt. Messina typed the statement as the interrogator proceeded.

26. The statement is not verbatim but substantially contains what Smith told the two officers. (State's exhibit A).

27. The interrogation was initiated by Lt. Solomita and Sgt. Messina (Tr. p. 109, Tr. p. 112, Tr. p. 129).

28. Lt. Solomita and Sgt. Messina knew that arrangements at the G.A. court on Kendrick Avenue commenced at 10:00 a.m.

29. Police station prisoners are normally transferred by van to the G.A. somewhere around 10:00 a.m.

30. Lt. Solomita notified Smith of his Miranda rights before the statement was taken.

31. Smith was given his Miranda rights again as printed on the voluntary statement form.

32. Smith initialed the Miranda form in four places.

33. Smith understood his Miranda rights fully.

34. Smith swore to the truth of the statement before Sgt. Segal.

35. The satement was concluded at 11:45 a.m.

36. Shortly thereafter Smith was taken to Kendrick Avenue where he met with Baptiste, his parents, and Attorney St. John.

37. During the interrogation Smith asked Lt. Solomita what he could do for him.

38. Lt. Solomita replied that he could do nothing but that he would talk to the prosecutor about lowering the bond. (Tr. p. 133).

39. Smith said he could make bond between $5000 and $10,000.

40. Smith wanted to be out of jail when his girl friend had her baby.

41. While Sgt. Messina was in the police car preparing to take Smith to Kendrick Avenue, he said he would take them to Route 8 North and show them where he had disposed of a gun involved in the crime.

42. He told the officers before they left for Route 8, that he had lied and that he had given the gun to Michael Perry.

43. The officers then drove Smith to Kendrick Avenue, arriving about 12:20 p.m.

44. Smith was on parole from a federal sentence in New York when arrested and was knowledgeable in the workings of the criminal justice system.

45. There was no physical force used on Smith.

46. There was no intimidation or pressure used on Smith other than the normal intimidating effect of the setting.

47. Smith was not deprived of sleep, food, liquids, telephone calls or cigarettes.

48. Smith's statements were not brought about as a result of promises by the police.

49. Lt. Solomita's promise to speak to the prosecutor did not promise any particular result.

50. Smith's will was not overborne by the interrogation or promise of Lt. Solomita.

51. Smith's statements, written and oral, were voluntary.

52. Smith did not take the stand at the suppression hearing.

DISCUSSION

The defendant has moved to suppress a written confession and oral statements made by himself prior to his appearance, at approximately 12:20 p.m. on Monday, February 4, at the Kendrick Avenue courthouse in Waterbury, Connecticut. In favor of suppression, the defendant claims that the confession was involuntary under the due process clause, that the confession was the tainted product of an illegal arrest in violation of the fourth and fourteenth amendments, that it violated his sixth and fourteenth amendments right to the assistance of counsel, and that it violated his fifth and fourteenth amendments right to be free from compulsory self-incrimination. The court has examined each of these claims.

I.

VOLUNTARINESS

The ultimate test of the admissibility of any confession or extrajudicial statement is its voluntariness. *State* v. *Stankowski,* 42 Conn. L.J. #46, 5 (5-12-81); *Culombe* v. *Connecticut,* 367 U.S. 568, 602, 81 S. Ct. 1860 (1961); *Rogers* v. *Richmond,* 365 U.S. 534, 544, 81 81 S. Ct. 735 (1961). A state must prove by a preponderance of the evidence that under all the circumstances a particular confession is voluntary. *Lego* v. *Twomey,* 404 U.S. 477, 489, 92 S. Ct. 619 (1972); *State* v. *Hawthorne,* 176 Conn. 367, 370 (1978); *State* v. *Staples,* 175 Conn. 398, 405, 406-407 (1978). The issue of voluntariness is one of fact for determination by the trial court in the exercise of its legal discretion. *State* v. *Devine,* 149 Conn. 640, 652 (1962). The discretion must, however, be exercised in accordance with constitutional standards of due process. *State* v. *Derrico,* 41 Conn. L.J. #50, 7, 11 (6-10-80).

The test of voluntariness is whether an examination of all the circumstances disclose that the conduct of "law enforcement officials was such as to overbear the defendant's will; to resist and bring about confessions not freely self-determined." *Rogers,* supra at 544; *Staples,* supra at 408.

> The ultimate test remains . . . . 'Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 225, 93 S. Ct. 2041 (1973); *Culombe,* supra at 602.

"The state of mind which renders a statement involuntary, and hence inadmissible, is that induced by mistreatment, threats, promises, physical or mental abuse which deprives an otherwise rational mind of the exercise of its free will and powers of decision and discernment." *State* v. *Rosa,* 170 Conn. 417, 424 (1976).

This court, as the ultimate judge of the credibility of witnesses and the weight to be accorded to their testimony, has found the defendant's confession to be the voluntary expression of his free will. See *Hawthorne,* supra at 371; *State* v. *Penland,* 174 Conn. 153, 157-158 (1978). No credible evidence has been introduced to the court showing that there was any mistreatment, threats, promises or physical or mental abuse which would induce the defendant to execute an involuntary confession. The defendant was not deprived of sleep, food, liquids, telephone calls or cigarettes.

One claim raised by the defendant which must be noted is that his confession was involuntary as it was induced by a promise to speak to the prosecutor about a reduction in the bond.

At the hearing on this motion Lieutenant Solomita testified that during the interrogation of the defendant on the morning of February 4, 1980, the defendant asked him what he could do for him. The lieutenant replied that he could do nothing, but that he would talk to the prosecutor about lowering the bond. This is hardly a promise of leniency which would induce the defendant to make an involuntary confession.

In *Bram* v. *United States,* 168 U.S. 532, 542-43, 18 S. Ct. 183 (1897) the Supreme Court cited an English textbook stating that

a confession is not voluntary if "obtained by any direct or implied promises, however slight." Many federal appellate decisions have expressed the view that this rule is not to be applied with, what one opinion called, "wooden literalness." *United States* v. *Ferrara,* 377 F.2d. 16, 17 (2d Cir. 1967) cert. den. 389 U.S. 908; *United States* v. *Frazier,* 434 F.2d 994 (5th. Cir. 1970); *United States* v. *Glasgow,* 451 F.2d 557, 558 (9th. Cir. 1971). In *Ferrara,* supra, and *United States* v. *Reed,* 572 F.2d 412 (2d Cir. 1978) the defendants confessed after being promised reduced bail. Both confessions were found to be voluntary, despite the promise for reduced bail.

Typical of the principle developed in the state decisions is a statement in *Commonwealth* v. *Meehan,* 387 N.E. 2d. 527, 534 (Mass. 1979).

> An officer may suggest broadly that it would be 'better' for a suspect to tell the truth, may indicate that the person's cooperation would be brought to the attention of the public officials or others involved, or may state in general terms that cooperation has been considered favorably by the courts in the past. What is prohibited, if a confession is to stand, is an assurance, express or implied, that it will aid the defense or result in a lesser sentence.

See *People* v. *Tanser,* 75 Ill. App. 3d 482, 394 N.E. 2d 616 (1979); *State* v. *Biron,* 266 Minn. 272, 123 N.W. 2d 392 (1963); *State* v. *Mullin,* 249 Iowa 10, 85 N.W. 2d 598 (1957); *Womack* v. *Alabama,* 281 Ala. 499, 205 So. 2d 579 (1967).

None of the cases urged on the court for the proposition' that a confession is involuntary, if obtained after a defendant is told by an officer that he would speak to the prosecutor about a possible reduction in bond, support the conclusion that the confession in

this case is involuntary.[1] All of these cases involve forms of coercion greater than the claimed inducement here.

Therefore, this court concludes that the statement by Lieutenant Solomita, that although he could do nohting for the defendant, he would talk to the prosecutor about lowering the bond, did not render the defendant's statement involuntary.[2].

In addition, under the totality of the circumstances of this confession, the court concludes that the defendant's will was not overborne and that his statements were voluntary. See *Stankowski,* supra at 10; *Derrico,* supra at 11-12.

II.

FOURTH AMENDMENT

The defendant was arrested on February 2, 1980 after he turned himself in to the Waterbury Police Headquarters. His confession was given on February 4, 1980. The defendant claims that the confession was the tainted product of his illegal arrest, in violation of the fourth and fourteenth amendments.

Even if this court found the defendant's arrest to be illegal, this would not automatically render his confession inadmissible. *Walters* v. *Warden,* 155 Conn. 316, 323 (1967); *Traub,* supra at 173-174. A causal connection must also be found between an illegal arrest and a subsequent confession, which would render the

---

1 *Hillard* v. *State,* 406 A. 2d 415 (Md. App. 1979); *State* v. *Christian,* 604 S.W. 2d 758 (Mo. App. 1980); *People* v. *Bay,* 430 N.Y.S. 2d 601 (N.Y. App. 1980); *Staet* v. *McGrew,* 38 Or. App. 493, 590 P. 2d 755 (1979).

2 The defendant's claim, that a delay in his arraignment violated 1978 Practice Book §§ 635 and 637, is easily disposed of. The sections quoted are advisory only, and do not require arraignment at a certain time of the next court day but only on the next court date. The defendant was arraigned at 11:45 A.M. on the next court date, not at 10:00 A.M. when court opened, as he had chosen to give a statement at 9:45 A.M. and his arraignment was delayed until the statement's completion. See Conn. Gen. Stat. §§ 54-1c, 54-lg, (requiring prompt presentment.) *State* v. *Cobbs,* 164 Conn. 402, 416 (1973) (1:45 presentment.).

confession the tainted product of the illegal arrest. *State* v. *Derrico,* 41 Conn. L.J. #50, 7, 9 (6-10-80); *Dunaway* v. *New York,* 442 U.S. 200 ,217, 99 C. Ct. 2248 (1979); *Wong Sun* v. *United States,* 371 U.S. 471, 487-488, 83 S. Ct. 407 (1963).

However, the court does not need to decide whether the defendant's confession was the tainted product of an illegal arrest, as the defendant was validly under arrest at the time he confessed. The defendant had voluntarily turned himself in to the Waterbury Detective Division, knowing that a warrant had been issued for his arrest. An application had been filed for the warrant on February 1, 1980, and on that date a valid warrant was issued for the defendant's arrest by Judge William Sullivan. The application contained sufficient facts to establish probable cause for the arrest. See Conn. General Statutes § 54-2a(a); *State* v. *Hoffler,* 174 Conn. 452, 460 (1978); *State* v. *Taylor,* 28 Conn. Sup. 19 (1968).

As the defendant's arrest was pursuant to a valid warrant supported by probable cause, and no evidence has been introduced showing that the arrest was effectuated in an unlawful manner, his subsequent confession could not be the tainted product of an illegal arrest.

III.

SIXTH AMENDMENT

The defendant confessed on Monday, February 4, 1980. At that time the defendant had not been indicted or arraigned.[3] He was being held pursuant to an arrest warrant dated February 1, 1980.

---

3 The position taken by the defendant, that because the information against him was *signed* on February 1, 1980, that his right to counsel had attached on that date, is unpersuasive. In Connecticut an information serves the function of justifying the issuance of an arrest warrant; it does not become the basis of the charges upon which the accused is to be arraigned and tried. *Walters* v. *Platt,* 22 Conn. Sup. 1, 7 (1956). Also, the *signing* of an information is not the act which renders the document operative, but rather its presentment to the court, and its filing with the clerk. See 1978 Practice Book §§ 617, 620; former Conn. General Statutes § 54-44 (repealed by 1967 P.A. 656 § 60).

The defendant contends that the procurement of his confession at the time violated his sixth and fourteenth amendments right to the assistance of counsel.

A defendant's sixth and fourteenth amendments right to counsel attaches only at the time that adversary judicial proceedings are initiated against him. *Powell* v. *Alabama,* 287 U.S. 45, 53 S. Ct. 55 (1932); *United States* v. *Wade,* 388 U.S. 218, 87 S. Ct. 1926 (1967). In *Kirby* v. *Illinois,* 406 U.S. 682, 689-90, 92 S. Ct. 1877 (1972) the court stated:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. See *State* v. *Middleton,* 170 Conn. 601, 609-610 (1976).

The court in *Kirby,* supra, did not state the exact point at which "adversary judicial criminal proceedings" begin, although it did allude that they do begin upon "formal charge, preliminary hearing, indictment, information, or arraignment". *Kirby,* supra at 689.

It is beyond dispute that the sixth amendment right to counsel attaches after indictment or after the preliminary hearing. *Massiah* v. *United States,* 377 U.S. 201, 84 S. Ct. 1199 (1964); *Hamilton* v. *Alabama,* 368 U.S. 52, 82 S. Ct. 157 (1961); see also *United States* v. *Mohabir,* 624 F. 2d 1140 (2d Cir. 1980); *United States*

v. *Satterfield,* 558 F. 2d 655 (2d Cir. 1977). However, it is not beyond dispute that a defendant's right to counsel has attached after arrest but before indictment or arraignment. See *United States* v. *Duvall,* 537 F. 2d 15, 20-22 (2d Cir. 1976) cert. den. 96 S. Ct. 3173, cited in *Edwards* v. *Arizona,* —U.S.—, 49 L.W. 4496, 4497 n. 7 (5-19-81) (the filing of a complaint and the issuance of an arrest warrant does not trigger the right to counsel under the Sixth Amendment, that right accruing only upon furher proceedings.

Early Connecticut decisions could be authority for the position that in this state the right to counsel attaches after arrest, even before indictment or arraignment. See *State* v. *Klimczak,* 159 Conn. 609, 610 (1970); *State* v. *Darwin,* 161 Conn. 413, 428 (1971); *State* v. *Darwin,* 29 Conn. Sup. 423, 430-31 (1972); *State* v. *Beck,* 6 Conn. Cir. 130, 136 (1969). However, the most recent decision, *State v. Packard,* 42 Conn. L.J. #48, 5 (5-26-81) stated that:

> Counsel is required at all lineups and showups held after the commencement of criminal proceedings and is not required at the pre-arraignment state, including the period from the initial detention to the formal arrest. 42 Conn. L.J. #48 at 7-8.

See also *State* v. *Towsend,* 167 Conn. 539, 556, cert. den. 423 U.S. 846, 96 S. Ct. 84 (1975); *State* v. *Middleton,* 170 Conn. 601, 609-610 (1976); *State* v. *Carr,* 172 Conn. 458, 472 (1977).

The court stated in *Packard,* supra, p. 8:

> "We adopted the language from *Kirby* in *State* v. *Middleton,* 170 Conn. 601, 609-610, 368 A. 2d 66 (1976): 'The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only

then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. See *Powell* v. *Alabama,* 287 U.S. 45, 66-71, 53 S. Ct. 55, 77 L. Ed. 158; *Massiah* v. *United States,* 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246; *Spano* v. *New York,* 360 U.S. 315, 324, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (Douglas, J., concurring) . . . . *Kirby* v. *Illinois,* 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411.' The point when the right to counsel attaches is at or after the time that the adversary judicial proceedings have been initiated against the defendant that is, as soon as criminal charges are formally made against the accused, thereby subjecting him to a criminal prosecution. *State* v. *Towsend,* 167 Conn. 539, 556, 356 A. 2d 125, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975)."

The court holds that the defendant's sixth amendment right to assistance of counsel was not violated since it had not attached prior to the initiation of *adversary judicial proceedings.*

IV.
FIFTH AMENDMENT AND CONCLUSION

Finally, the defendant has contended that the manner of obtaining his confession violated his fifth and fourteenth amendments right to counsel.

In *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966) the United States Supreme Court outlined the warnings necessary to safeguard an accused's constitutional rights under the fifth

amendment. The court stated that prior to any question,[4] the accused must be warned that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. *Miranda, supra,* 384, U.S. at 479.

The court finds that the defendant was more-than-adequately warned of his rights, required under *Miranda,* supra. He was advised of his *Miranda* rights on February 2, 1980 by Detective Joseph Morgan after the defendant voluntarily turned himself in to the Waterbury Police Headquarters. Before being interrogated on February 2, 1980, the defendant was again advised of his *Miranda* rights and was shown a white *Miranda* card which he read. On February 4, 1980 the defendant was again notified of his *Miranda* rights by Lieutenant Solomita before making his statement. He was given his *Miranda* rights for the fifth time as printed on the voluntary statement form which the defendant read and initialed in four places.

> Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with

---

4 The court finds it beyond dispute that the defendant was in custody at the time the confession was obtained. See *State* v. *Januszewski,* 42 Conn. L.J. #8, 44 (8-19-80); *State* v. *Singleton,* 174 Conn. 112, 115 (1977); *Oregon* v. *Mathiason,* 429 U.S. 492, 495, 97 S. Ct. 711 (1977). It is also quite clear that he was subject to interrogation. *Januszewski,* supra; *Rhode Island* v. *Innis,* 446 U.S. 291 (1980); *State* v. *Ferrara,* 176 Conn. 508, 519 (1975).

> the attorney and to have him present during any subsequent questioning. *Miranda,* supra, 384 U.S. at 474.

See also *Michigan* v. *Mosley*, 423 U.S. 96, 104 n. 10 (1975); *Rhode Island* v. *Innis,* 446 U.S. 291, 298 (1980).

The transcript of the February 2, 1980 interrogation contains the following conversation:

PO: Who do you want to call? Who's your lawyer? Do you have anybody in mind that you want to call?

LS: I want to call my mother or call my father.

PO: Your father's gone. He's gone. What kind of (inaud.) What do you want to call him for?

LS: So he can get me a lawyer.

PO: You tell us who the lawyer, we can get you a lawyer if that's what you want.

LS: I don't want no public defender.

PO: No, I said if you tell us who you want we'll call him for you (Pause) I'll get you a public defender but first let me advise you of your rights.

LS: OK

The transcript further shows that the defendant was later asked again who his lawyer was.

The court interprets the defendant's statement, that he wanted to call his father so that he could get the defendant a lawyer, as a request for an attorney.

> If the interrogation continues without the presence of an attorney and a statement is taken a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois,* 378 U.S. 478, 490 n. 14, 84 S. Ct. 1758 (1964); *State* v. *Wilson,* 42 Conn. L.J. #37, 1, 3 (3-10-81).

As a statement was obtained on February 4, 1980, following the defendant's request for an attorney, a heavy burden rested on the state to show that the defendant waived his fifth and fourteenth amendments right to retained or appointed counsel.

This waiver must not only be voluntary but must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends upon the particular facts and circumstances surrounding each case, including the background experience and conduct of the accused. *Edwards* v.*Arizona,* —U.S.—, 49 L.W. 4496, 4497 (5-19-81); *Wilson,* supra at 3; *Johnson* v. U*erbst,* 304 U.S. 458, 464 (1938). The waiver need not be by an express statement but may be inferred from the actions and words of the person interrogated. *North Carolina* v. *Butler,* 441 U.S. 369, 373, 99 S. Ct. 1755 (1979); *Wilson,* supra at 3. The court must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated. *Butler,* supra at 373; *Wilson,* supra at 3. The state must demonstrate: (1) that the defendant understood his rights, and (2) that the defendant's course of conduct indicated that he did, in fact, waive those rights. Id.

The court finds that the defendant did understand his rights.[5] He was advised on five occasions of his rights as required under *Miranda,* supra. On more than one occasion the defendant expressly stated that he understood his rights. The defendant was 33 years old and was familiar with the workings of the criminal justice system. He had recently served six years in a New York prison for armed robbery. No evidence was presented of the defendant's physical or mental condition, or educational background, which would have aided the court in making a determination of the defendant's mental faculties. Nevertheless, due to the express

---

5 The court also finds that the waiver was voluntary. *Edwards,* supra; *Wilson,* supra; See Part I (above).

statements by the defendant contained in the transcript of the February 2, 1980 interrogation, and his course of conduct thereafter, the court finds that the defendant did understand his rights.[6]

As there is no express statement by the defendant that he wanted to waive his right to counsel, the court has examined the defendant's course of conduct, his actions and words, to see if a waiver should be inferred from the course of conduct.[7] *Butler,* supra at 373; *Wilson,* supra at 3.

Sufficient evidence has been presented to the court of the defendant's course of conduct from which the court could infer waiver, if this case were to be strictly decided under the principles of Connecticut constitutional law. This is not a case where no evidence was presented to the court from which the court could infer waiver. See *State* v. *Wilson,* 42 Conn. L.J. #37, 1 (3-10-81); *State* v. *Mascone,* 171 Conn. 500, 506, 508 (1976).

The defendant's conduct in this case is very similar to that of the defendant in *State* v. *Cobbs,* 164 Conn. 402 (1973). In *Cobbs,* supra, after the defendant indicated that he wanted to call an attorney, he was not further interrogated, and was given free use of a telephone. The defendant called his grandmother who went to see him at the police station. After talking with his grandmother, the defendant made a statement to the police.

In holding the confession admissible, the Connecticut Supreme Court stated that:

> (A)n accused who requests counsel may thereafter voluntarily waive his right to counsel provided he

---

6 More evidence of the defendant's understanding of his rights was presented to the court than the simple "Yes I do (understand)" in *Wilson,* supra.

7 The defendant did sign a voluntary statement form and did place his initials in a space indicating that he did not wish the presence of an attorney. However, this waiver occurred at 10:15 A.M. on February 4, 1980, after his fifth amendment rights were violated when the police initiated conversation with the defendant after he had requested an attorney.

> has had in the interim a full opportunity to obtain counsel or to have an attorney appointed for him. Id. at 420.

See *Cobbs* v. *Robinson,* 528 F. 2d 1331, 1342 (2d Cir. 1975) cert. den. 96 S. Ct. 1419.

In this case the defendant requested an attorney and was thereafter given free use of a telephone. Instead of calling an attorney, he called his girl friend who came to the police station. The defendant had stated to Sergeant Dest that he did not want to make a statement then until he talked to his girl friend. After speaking with his girl friend he again declined to make a statement. However, the next day the defendant did make a statement to Lieutenant Anthony Solomita and Sergeant Charles Messina who did not know of the defendant's prior request for counsel.

As the defendant did give a statement after having full opportunity to obtain counsel, and after having consulted with his girlfriend, his court would hold that under *Cobbs,* supra, the defendant had waived his right to counsel.[8] However, the court finds itself bound by the requirements of the United States Constitution as interpreted by the United States Supreme Court.

In the recent case of *Edwards* v. *Arizona,* 49 L.W. 4496 (5-19-81) the United States Supreme Court held that

> (A)n accused . . . having expressed his desire to deal with the police only through counsel, is not

---

8 Compare *Cobbs* with *State* v. *Moscone,* 171 Conn. 500 (1976) at the opposite end of the spectrum. A 17 year old male in custody stated that he would not say anything until he saw his attorney. No action was taken on this request. Two or three hours later a police officer, after once again advising him of his *Miranda* rights, on questioning, elicited an incriminating statement. The Supreme Court of Connecticut reversed the trial court, holding that it had not been shown that the defendant's request to consult with an attorney had been scrupulously honored or that he had knowingly and intelligently waived his right to counsel. The court at p. 506 pointed out that in *Moscone,* unlike *Cobbs,* there was no evidence that it was the defendant who indicated a willingness to answer questions.

> subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges or conversations with the police.* (Emphasis added). Id. at 4498.

Edwards, supra, is distinguishable on its facts.[9] However, the court feels bound by the apparent per se rule by the six-member-majority, that after a request for counsel is made, no interrogation can occur unless the accused initiates the further conversation. Id. at 4498, (Powell, J. and Rhenquist, J. concurring).

In this case, although the defendant did request to see Sergeant Dest on Sunday, February 3, 1980, he made no request to see either Lieutenant Solomita or Sergeant Messina on February 4, 1980, the date on which the defendant confessed. In fact, the evidence indicated that the officers initiated the conversation with the defendant on that date.[10]

Therefore under the holding in *Edwards* v. *Arizona,* supra,[11] the court holds that the defendant did not validly waive his right to counsel under the fifth and fourteenth amendments to the United

---

9 In that case, when the defendant stated that he did not want to talk to anyone, he was told that "he had to talk". Id. at 4496. No such compulsion is present here. In addition, the defendant in *Edwards,* supra, was not given free access to a phone, as the defendant was in this case. Id. at 4496, 4498.

10 In *Cobbs,* supra, the court noted that the defendant had initiated the subsequent conversation with the police, but this factor played little part in the court's decision. 164 Conn. 419.

11 The *Edwards* court cut off further interrogation "until counsel has been made available to him." A viable argument could be made that counsel was made available to Smith when he was allowed to make a phone call, when he conferred with Ms. Baptiste, and when Detective Morgan in the taped interview offered help in getting a lawyer. But available means more than just a phone call. Availability must be determined under the totality of the circumstances. In this case where the defendant was incarcerated over a weekend and his companion went to the attorney's office at 9:00 a.m. on Monday and was waiting with defendant's parents and the retained attorney from shortly after 10:00 a.m., the normal arraignment time at the arraignment court, while defendant was under interrogation leading to a confession, a realistic and fair view must conclude that counsel had not been made "available" to him when he confessed.

States Constitution.[12] As the statements given on February 4, 1980 violated the defendant's *Miranda* right to counsel under the fifth amendment, this court holds that it must be suppressed and that it cannot be used as evidence against the defendant.

S/ T. Clark Hull , J.

County of New Haven

ss. Judicial District of Waterbury

State of Connecticut

I hereby certify that the foregoing is a true and accurate copy of the original Memorandum of Decision dated July 27, 1981, as on file and of record in *State of Connecticut v. Lester Smith* No. Cr 4-77369.

In witness whereof, I have
hereunto set my hand and the seal
of said Court on December 10, 1981

S/ T. Clark Hull

T. Clark Hull
Judge of the Superior Court

---

12 The court finds that *Edwards*, supra, decided on May 18, 1981, is applicable to this case although the defendant confessed on February 4, 1980. The relevant occurrence did take place before the decision in *Edwards*, supra. See *Stovall* v. *Denno*, 388 U.S. 296, 87 S. Ct. 1967 (1967); *Williams* v. *United States*, 401 U.S. 646, 91 S. Ct. 1148 (1971); *State* v. *Brown*, 160 Conn. 346 (1971); *State* v.*Pueschel*, 30 Conn. Sup. 556 (1973). In addition, *Edwards*, supra, would not be retroactive when applying the traditional formula. See *Stovall*, supra; *Brown* v. *Louisiana*, 447 U.S. 323, 100 S. Ct. 2214 (1980).

However, even if not retroactive, *Edwards*, supra, does apply to this case as it has not yet proceeded to trial. See *Johnson* v.*New Jersey*, 384 U.S. 719, 86 S. Ct. 1772 (1966); *State* v. *Benitez*, 157 Conn. 384 (1969); *State* v. *Magoon*, 156 Conn. 328 (1968). In fact, *Edwards*, supra, was decided on the same date that the state submitted its brief on this issue, so the court has had the full benefit of the opinion in making the decision.

No. 10980	:	SUPREME COURT
STATE OF CONNECTICUT VS.	:	STATE OF CONNECTICUT
LESTER SMITH	:	October 15, 1981

ORDER

THE MOTION OF THE DEFENDANT TO DISMISS THE APPEAL OF THE PLAINTIFF

HAVING BEEN HEARD BY HE COURT, IT IS HEREBY ORDERED BY THE SUPREME COURT, THAT SAID MOTION BE AND THE SAME IS HEREBY GRANTED.

STATE OF CONNECTICUT
Hartford County, } Hartford

I, Michele T. Angers, Assistant Clerk-Appellate, Hereby Certify the foregoing to be true copy of Motion to Dismiss and Order thereon in #10980 *State of Connecticut* v. *Lester Smith.*

In Testimony Whereof, I have hereunto set my hand and seal of Supreme Court at Hartford, in said County, this 8th day of December, 1981.

S/ Michele T. Angers

Assistant Clerk-Appellate